

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**JANET HURST,
RESPONDENT**

vs.

**KANSAS CITY, MISSOURI SCHOOL DISTRICT
APPELLANT**

DOCKET NUMBER WD76534

DATE: April 29, 2014

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable Sandra Midkiff, Judge

Appellate Judges:

Division One: Joseph M. Ellis, P.J., Karen King Mitchell, J. and Anthony Rex Gabbert, J.

Attorneys:

Martin M. Meyers, for Respondent

Shana J. Long, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JANET HURST, RESPONDENT

v.

KANSAS CITY, MISSOURI SCHOOL DISTRICT

WD76534

Jackson County, Missouri,

Before Division One Judges: Joseph M. Ellis, P.J., Karen King Mitchell, J. and Anthony Rex Gabbert, J.

Respondent Janet Hurst filed a Missouri Human Rights Act ("MHRA") action against Appellant Kansas City, Missouri School District ("the District") alleging the District discriminated against her because of her age when it eliminated her position as a school psychological examiner ("SPE") and failed to hire her for the reconstituted position of educational diagnostician ("ED"). The case proceeded to trial, and the jury found in favor of Respondent in the amount of \$247,083.78 in actual damages and \$200,000.00 in punitive damages. The Circuit Court of Jackson County entered its judgment accordingly. The District now raises eight points on appeal, and Respondent has filed a motion for her costs and attorney fees on appeal.

AFFIRMED

Division One holds:

1. The trial court did not commit reversible error when it used MAI 19.01 language to modify the MHRA instruction, MAI 38.01, because, even if the MAI 19.01 modification proved inapplicable to the present case, the District failed to establish how it was prejudiced by the modified instruction. The District contends only that the modified instruction "created confusion in that it misstated the law regarding the elements required for Respondent to recover under the Missouri Human Rights Act." Such a conclusory statement, without further explanation, falls short of establishing the requisite prejudice for instructional error. Accordingly, we cannot say the trial court's instructions in this case constituted prejudicial or reversible error.
2. The trial court did not err in denying the District's motions for directed verdict or JNOV because Respondent made a submissible case with respect to damages. Respondent testified that she incurred \$247,083.78 in lost wages and benefits and that she suffered emotional distress, humiliation, and anxiety as a result of the District eliminating her SPE position and its failure to hire her as an ED. The fact that the District argued that Respondent failed to mitigate her damages by not accepting the teaching position that would have paid the same wages and benefits as the ED position

does not mean that Respondent failed to make a submissible case as to damages. Rather, the District's failure-to-mitigate argument affects only the measure of damages Respondent can recover. Thus, when viewed in the light most favorable to the verdict, Respondent made a submissible case with respect to damages.

3. The trial court did not err in denying the District's motions for directed verdict or JNOV with respect to the District's failure-to-mitigate defense because, as the defendant, the District bore the burden of proof with respect to its failure-to-mitigate defense, and directed verdicts are typically not granted in favor of the party bearing the burden of proof. Furthermore, Respondent did not admit the basic facts necessary to prove the District's defense that she failed to mitigate her damages. Although Respondent admitted to declining the teaching position, she argued to the jury it was unreasonable for her to accept the teaching position because she had not taught in a classroom setting for over thirty-seven years, she was offered the position two weeks before school was scheduled to start, and the position would be at a "turn-around school." Thus, the District was not entitled to a directed verdict on its failure-to-mitigate defense.

4. The trial court did not abuse its discretion when it denied the District's motion for remittitur. Respondent testified that her economic damages totaled \$247,083.78 in lost wages and benefits but that she had earned \$106,134.64 through other employment since her retirement. Nevertheless, Respondent also testified that she was very upset and embarrassed when she was not hired as an ED and that not being hired caused additional anxiety because she was in the process of purchasing a new home. While such non-economic damages do not lend themselves well to precise calculation, Respondent requested, in closing argument, that the jury award between \$280,000 and \$420,000 in damages for the emotional distress and humiliation she suffered as a result of not being hired as an ED. Given such evidence, we cannot say that the jury's \$247,083.78 verdict was excessive. Thus, the trial court did not abuse its discretion in denying the District's motion for remittitur.

5. The trial court did not err in denying the District's motions for directed verdict or JNOV with respect to whether Respondent made a submissible MHRA age discrimination claim because there was substantial evidence from which a reasonable juror could conclude that age was a contributing factor in the District's decision to eliminate Respondent's SPE position. When viewed in the light most favorable to the verdict, the record reflects: twelve SPEs remained at the end of the 2009-2010 school year yet the District conducted interviews for the twelve ED positions; the twelve ED positions were never filled for the 2010-2011 school year; the District never implemented the counseling component, which was the supposed purpose for reconstituting the SPE position; McNellis, who made comments discouraging the helping of older SPEs, was involved in the decision to reconstitute the SPE position, the developing of the model questions and answers for the ED position, and the interviewing process; and, as a result of the interviewing process, the four eldest SPEs were not hired for ED positions. From such evidence, a reasonable juror could have found that the District's proffered explanation for eliminating the SPE position was false

and inferred discriminatory purpose on the District's behalf. Thus, Respondent made a submissible age discrimination claim with respect to the District's elimination of her SPE position.

6. The trial court did not err in denying the District's motions for directed verdict or JNOV with respect to whether Respondent made a submissible MHRA age discrimination claim because there was substantial evidence from which a reasonable juror could conclude that age was a contributing factor in the District's failure to hire Respondent for the ED position. When viewed in the light most favorable to the verdict, the record reflects: Respondent had received a positive review in her last performance assessment, which indicated that she exceeded or met expectations in all categories assessed and recommended her for rehire; the District based its hiring decisions solely upon Respondent's interview, not her past performance, despite the fact the District informed applicants it would consider their previous work history; evidence from the interview process indicated that Respondent was scored lower on several questions than younger applicants even though she gave the same or better answers; and as a result of the interview, the four eldest SPEs, one of which was Respondent, were not hired as EDs. From such evidence, a reasonable juror could conclude that age was a contributing factor in the District's failure to hire Respondent as an ED.

7. The trial court did not err in denying the District's JNOV motion with respect to punitive damages because, when viewed in the light most favorable to submissibility, the evidence indicates the District's culpable mental state in that it acted with intentional disregard for Respondent's rights when it decided, because of her age, to reconstitute the SPE position and not to hire her as an ED. Accordingly, Respondent made a submissible case for punitive damages.

8. The trial court did not err when it admitted the testimony of Thomas Levin because, even if we were to assume, *arguendo*, that Levin's testimony was improperly admitted, the District failed to establish how it was prejudiced by Levin's testimony. The District argued that Levin's testimony regarding his own age discrimination suit against the District created the prejudicial impression that Respondent's age discrimination claim was more likely to be true. Levin's testimony, however, pertained primarily to the interviewing process he went through at the end of the 2009-2010 school year, and his testimony regarding his age discrimination suit against the District amounted to him answering affirmatively that he had filed such a suit against the District. Under such circumstances, we cannot say that any perceived prejudice resulting from Levin's testimony was outcome-determinative.

9. The trial court did not err in denying the District's motion for new trial with respect to its claim that the trial court erroneously admitted the District's draft transformation plan into evidence because, even assuming *arguendo* that it was error to admit the draft, and further that the District could have been prejudiced by the draft's admission, any such prejudice was negated by the stipulation and the subsequent testimony that indicated that there was community participation in the making of the draft and that it was unknown if the District or a community member drafted the allegedly age-insensitive

remarks on page 66 that were not included in the final transformation plan adopted by the District.

10. The trial court did not err in granting Respondent's motion for the equitable relief of reinstatement in that such equitable relief is available under the MHRA and is the preferred remedy for unlawful employment discrimination.

11. Given that Respondent is the prevailing party on appeal, we sustain Respondent's motion for cost and attorney fees on appeal and remand the case to the trial court for the purpose of conducting a hearing to determine the reasonableness of the costs and fees requested and to enter an appropriate award.

Opinion by Joseph M. Ellis, Judge

Date: April 29, 2014

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